No. 93-1286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

AMERICAN AIRLINES, INC.,
Petitioner,
v.
MYRON WOLENS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF

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There is little dispute that respondents' Consumer Fraud Act damage claims have an obvious "connection with or reference to" American's rates and services, and are therefore preempted by Section 1305. *See Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992).[1] *Amicus* the United States agrees that those statutory claims are preempted, U.S. Br. at 10-15, and respondents have raised only a *pro forma* defense of those claims at the end of their brief. *See* Resp. Br. at 40-42.

Respondents' common law contract claims equally "relate to" American's rates and services, and respondents have made no substantial argument to the contrary. Those claims have precisely the same "connection with or reference to" American's rates and services as do the statutory claims. A damages award on the contract claims would have precisely the same impact on American's rate and

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[1] On July 5, 1994, Section 1305 and other transportation provisions were revised and codified without substantive change. PL 103-272, 108 Stat. 745. *See* the statutory appendix to this reply.

service decisions as would a damages award on the statutory claims. The Illinois Supreme Court held, and respondents concede, that the same contract claims—based on the same facts and the same state law—did "relate to" American's rates and services insofar as they sought injunctive relief. Preemption does not depend on the form of relief requested, or on the label plaintiffs choose for their claim. *See* Amer. Br. at 24-25. Thus, the Illinois Supreme Court's refusal to preempt respondents' contract damage claims must be reversed.

The United States agrees that respondents' contract damage claims "relate to" American's rates and services within the meaning of Section 1305, and acknowledges that the phrase "enforce any law" in Section 1305 *was* intended by Congress to encompass and preempt common law enforcement of contract damage claims that "turn upon state policies that are independent of the intent of the parties." U.S. Br. at 29-30.[2] The United States argues, however, that "any law" should be narrowly construed to exclude from preemption common law enforcement of "terms agreed to by private parties," and urges a remand to determine whether respondents' contract claims are preempted under this test. U.S. Br. at 17.

No remand is necessary. The government's reading of Section 1305 flatly contradicts the settled, ordinary meaning of "law" as repeatedly interpreted by this Court. Nothing in the legislative history suggests that Congress intended to exclude contract claims enforcing contractual obligations from Section 1305, and the United States does not contend that such a construction is necessary to further ADA's purposes. It claims only that rewriting Section 1305 in this way would be more "consistent" with

[2] Even respondents agree that Section 1305 "assures that the states" will not impose "their own normative standards," and agree that Section 1305 "may bar a state from enforcing its own normative standards" in a breach of contract action. Resp. Br. at 11, 19. They argue, however, that their contract claims do not involve "the types of normative standards which Congress intended to preempt." *Id.* at 12.

ADA's purposes. U.S. Br. at 17. Even if correct, that argument would not justify disregarding the statute's clear and ordinary meaning. And the argument is wrong. The construction urged by the United States *impairs* the ADA's core objectives in much the same way the narrow construction of Section 1305 rejected in *Morales* would have impaired those objectives.

In any event, respondents' contract claims would be preempted even under the test proposed by the United States because those claims inescapably depend on state policies that are independent of the intent of the parties. Indeed, the state court cannot reach the merits of respondents' claims unless it first invalidates or limits the express reservation of the right to change AAdvantage Program rules contained in AAdvantage contracts. Furthermore, because respondents do not allege that American expressly promised to make available any seat on any flight, and because respondents' claims rest solely on *unilateral* offers, the contractual obligation respondents posit will exist, if at all, only as a result of normative state policies. *See* pages 17-19.

I. RESPONDENTS' CLAIMS PLAINLY "RELATE TO" AMERICAN'S RATES AND SERVICES UNDER *MORALES*.

There can be no serious dispute that all of respondents' claims "relate to" American's rates and services under *Morales*. Respondents argue that the connection is tenuous—akin to that of gambling or prostitution laws. Resp. Br. at 13. But as the United States correctly observes, respondents' claims "directly attack" American's rates and " 'quite obviously' relate to rates and services because, as pleaded by the respondents, they expressly 'bear[] a "reference to" ' rates and services." U.S. Br. at 12 (quoting *Morales*). Furthermore, " 'as an economic matter,' " respondents' claims have the same " 'forbidden significant effect' " as the consumer protection law preempted in

Morales. U.S. Br. at 8, 13 (quoting *Morales*).[8] *Morales* thus requires preemption of respondents' claims.

Any other result would seriously undermine the effectiveness of Section 1305. Respondents' claims, brought on behalf of a nationwide class of four million people, are an effort to regulate the competitive decisions airlines make regarding the terms of their frequent flyer programs. Respondents challenge a fundamental economic and competitive decision American made regarding the management of its inventory of available seats.[4] That is precisely the type of competitive decision Congress wanted to insulate from state interference. Accordingly, respondents' challenge is precisely the kind of challenge that can and should be resolved at the federal level if ADA's procompetition objectives are to be achieved. Indeed, DOT *has* entertained challenges to the *very same* conduct that is challenged here, and found that conduct to be procompetitive and nondeceptive. *See* Amer. Br. at 33.

The regulatory effect of respondents' claims is underscored by respondents' invocation of the "public law mechanism[]" of a class action, which serves principally to regulate "systematic practices that violate external substantive norms."[5] Class actions function as a surrogate for direct regulatory enforcement by administrative

[3] It is irrelevant whether members "need never fly to accumulate credits," Resp. Br. at 11, because respondents have not challenged that aspect of the AAdvantage program in their pleadings. Here, respondents seek to redeem their mileage credits for "free air travel on any available date . . . for any available seat in the class of service provided." Pet. App. 52a.

[4] See Brief Amicus Curiae of Air Transport Association of America (No. 93-1286) ("ATA Amicus Br.") at 4, 5 ("airlines compete intensely with each other" regarding the changing "benefits and restrictions in their frequent flyer programs"); *id.* at 10-11 (giving examples).

[5] David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv. L. Rev. 851, 907 (1984).

bodies.[6] Furthermore, class actions by "private Attorneys General" serve much the same deterrence objective as do punitive damages. Both are authorized by state law to further state substantive policies.[7] Thus, the Illinois statute which authorizes class actions is based on the state judgment that allowing individual consumers to aggregate their claims in a class action will *deter* conduct that *might* be found to constitute consumer fraud or breach of contract, thereby regulating such conduct without the necessity for direct administrative action. Kenneth P. Ross, *Multistate Consumer Class Actions in Illinois*, 57 Chi.-Kent L. Rev. 397, 397-398 (1981) ("the threat of recoveries by large classes of disgruntled consumers acts as a strong deterrent"). Class actions challenging changes in airline rates and services plainly further state substantive policies of *deterring changes* in airline rates and services that *might* be found to constitute consumer fraud or breach of contract.

Respondents' contract claims and statutory claims are indistinguishable and must be treated identically under Section 1305. Both challenge the same conduct, and involve the same issue. Respondents acknowledge they are "bringing a claim under a . . . statute . . . when the airline's breach of contract constitutes a deceptive practice." Resp. Br. at i. Indeed, the contract claim cannot proceed unless American's exercise of its express reservation of the right to change the AAdvantage program—the very provision challenged in respondents' statutory claim—is found arbitrary, unfair, or otherwise unenforceable as a matter of state law.

Functionally, the statutory and contract claims have precisely the same connection with and reference to

[6] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1291 (1976); W. Kip Viscusi, *Wading Through the Muddle of Risk-Utility Analysis*, 39 Am. U. L. Rev. 573, 592 (1990).

[7] Although respondents have now abandoned punitive damages under their contract claim, they still seek punitive damages under their statutory claim. *See* Resp. Br. at 6, n.9.

American's rates and services, and would have precisely the same impact on those rates and services. Different labels do not change the nature of the challenge. Consumer fraud claims can easily be packaged as contract claims, and the two claims are frequently pled together.[8] If respondents' statutory claim is preempted, as the United States contends, allowing their challenge to proceed as a contract claim would hold federal policy hostage to artful pleading.

Similarly, respondents' argument that they only seek damages based on the "retroactive impact" of the 1988 changes to the AAdvantage program rules, *see* Resp. Br. at 7, is irrelevant, and wrong. Even if respondents' description were accurate, their claims would still "relate to" American's rates and services, and would therefore be preempted by Section 1305. Furthermore, the "impact" of the May 1988 announcement that future flights may be subject to capacity controls was not "retroactive." No class member would be affected by that change unless American actually imposed capacity restrictions on flights class members wanted to take after May 1988. Because decisions regarding capacity controls are driven by competitive considerations, these decisions change from flight to flight and from hour to hour.[9] Respondents' claims therefore have a continuing and prospective effect on American's competitive decisions because American's damages exposure has depended, and continues to depend, entirely on the extent to which American actually imposes capacity controls. *See Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992), and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959)

[8] *E.g., Gordon v. Boden*, 586 N.E.2d 461 (Ill. App. 1991), *appeal denied*, 591 N.E.2d 21 (Ill. 1992), *cert. denied*, 113 S. Ct. 303 (1992); *Miner v. Gillette Co.*, 428 N.E.2d 478 (Ill. 1981), *cert. granted*, 456 U.S. 914 (1982), *cert. dismissed*, 459 U.S. 86 (1982). Both claims have been raised in actions against other airlines in Illinois courts. *See* Brief of Amicus Curiae United Air Lines, Inc. (No. 93-1286) ("United Amicus Br.") at 1-2.

[9] *See* United Amicus Br. at 9-12.

(state "regulation can be as effectively exerted through an award of damages as through . . . preventive relief").

Because respondents cannot prevail under *Morales*, they reargue much of what *Morales* settled. They argue that Section 1305 was meant to do no more than place airlines in the same position as other deregulated industries, subject to the general laws of the states. *Morales* squarely rejected that argument, however, and held that air fare advertisements could *not* be subject to otherwise applicable state consumer fraud laws. Similarly, the legislative history respondents quote, Resp. Br. at 19-20, was addressed to an earlier bill that preempted only state laws "determining" rates, routes, or services. As *Morales* explained, that legislative history is irrelevant because Congress specifically rejected "determining" and substituted the broader "relating to" language. 112 S. Ct. at 2038 n.2. Respondents' reliance on Section 1506—the "savings clause"—is also foreclosed by *Morales*. Section 1506 "cannot be allowed to supersede the specific substantive pre-emption provision" contained in Section 1305. *Id.* at 2037. And contrary to respondents' arguments, preemption of state law does not leave consumers unprotected because, as *Morales* stressed, DOT has ample authority to protect consumers. *Id.* at 2040.

Respondents seek to divert attention from *their* claims by contending that any test that preempts their claims would necessarily preempt an "endless" list of other, quite different, claims. Rep. Br. at 27-28. That is wrong. As construed in *Morales*, Section 1305 preempts only state laws that relate in a more than tenuous way to the terms and conditions on which airlines compete for passengers.[10] In general, if enforcement of the state law at issue is

[10] In *Morales*, the United States correctly argued that Section 1305 preempts enforcement of state laws that relate to "the three basic areas in which airlines compete," because such laws "could interfere with the pro-competitive policies that federal authorities were directed by Congress to implement." Brief for the United States As Amicus Curiae In Support Of Respondents (No. 90-1064) at 9, 25.

likely to interfere with or change the competitive decisions airlines have made or would otherwise make regarding the rates, routes, or services they offer the public, the law is probably preempted; if not, the law is probably not preempted. The key concept, which is faithful to both the text and purpose of the ADA, is whether enforcement of the state law is likely to impact competitive decision-making. Here, it plainly would. In most of the hypothetical situations posited by respondents, it plainly would not. Thus, whatever the outer boundaries of Section 1305, *respondents*' claims fall squarely within the core area of congressional concern, and "do[ ] not present a borderline question." *Morales*, 112 S. Ct. at 2040 (quotation omitted).

II. THE PHRASE "ENFORCE ANY LAW" IN SECTION 1305 ENCOMPASSES COMMON LAW ENFORCEMENT OF CONTRACTUAL OBLIGATIONS.

The United States agrees that respondents' contract claims "relate to" American's rates and services. It argues, however, that the phrase "enforce any law" in Section 1305 should effectively be re-written to exclude common law enforcement of "agreed-upon terms". U.S. Br. at 21. There is no support for that argument in the statutory text, the legislative history, or in considerations of public policy and practical administration.

A. The Text of Section 1305 Does Not Exclude Enforcement of Obligations Imposed by Contract.

Section 1305 expressly preempts state enforcement of "any law" when its "particularized application" relates to airline rates, routes, or services. *See Morales*, 112 S. Ct. at 2038. That statutory language does not admit of a distinction between common law enforcement of normative policies and common law enforcement of contractual obligations. As the Court noted in *Cipollone*, "[a]t least since *Erie R. v. Tompkins*, 304 U.S. 64 . . . (1938), we have recognized the phrase 'state law' to include common law as well as statutes and regulations." 112 S. Ct. at 2620. Thus, the "natural" meaning of "law" encompasses

common law claims. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 99-101 (1972). "The term law in our jurisprudence usually includes the rules of court decisions as well as legislative acts," *Warren v. United States*, 340 U.S. 523, 526 (1951), including "judicial enforcement of private agreements." *Shelley v. Kraemer*, 334 U.S. 1, 14, 20 (1948) (common law enforcement of voluntarily assumed contractual obligation is state "law" under Fourteenth Amendment).

This Court's decision in *Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991), squarely confirmed that settled understanding. The issue was whether the phrase "all other law" in 49 U.S.C. § 11341(a) preempted enforcement of private contracts. At the urging of the United States, the Court held that the phrase "means what it says," and "include[s] laws that govern the obligations imposed by contract." 499 U.S. at 129.[11]

> A contract has no legal force apart from the law that acknowledges its binding character. As a result, the exemption . . . from 'all other law' effects an override of contractual obligations . . . by suspending application of the law which makes the contract binding.

Id. at 130. The United States notes the relevance of *Norfolk & Western*, but makes no effort to distinguish that case. U.S. Br. at 18, n.10. *Norfolk & Western* expressly relied on an even earlier case, *Schwabacher v. United States*, 334 U.S. 182 (1948), in which the Court held that a precursor of Section 11341(a) preempted state enforcement of voluntarily assumed contractual obligations. *Norfolk & Western*, 499 U.S. at 130-31.[12] Thus,

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[11] *See* Brief for the Federal Respondents in Nos. 89-1027 and 89-1029, at 18 ("[t]he exemption from 'all other law' is easily sufficient to embrace those laws governing the obligations of parties to contracts"). The United States argued that the statutory text was "dispositive." *Id.*

[12] In *Schwabacher*, holders of preferred stock in a railroad company had contested an ICC-approved merger with another railroad, claiming the merger would deprive them of their state-law contrac-

long before passage of the ADA in 1978, the Court had made clear that the ordinary meaning of "law" encompasses common law enforcement of contractual obligations.

Express preemption provisions like Section 1305 are to be given their ordinary, natural meaning "unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). In *Morales*, the Court interpreted the language of Section 1305 using the "assumption that the ordinary meaning of that language accurately expresses the legislative purpose." 112 S. Ct. at 2036. Since then, Congress has twice revised Section 1305, and far from questioning the Court's analysis, has endorsed "the broad preemption interpretation adopted by the United States Supreme Court in *Morales*."[13] The congressional confirmation that the language of Section 1305 should be given its ordinary, broad meaning should end the inquiry because the ordinary meaning is "conclusive" "absent a clearly expressed legislative intention to the contrary." *Consumer Product Safety Com'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *INS v. Cardozo-Fonseca*, 480 U.S. 421, 433 n.12 (1987). Even apart from congressional confirmation, this principle of statutory interpretation applies with special force to Section 1305. It would be strange indeed if Congress intended the words "relating to" to have a "broad" and "deliberately expansive" scope that is "conspicuous for its breadth," as *Morales* held, 112 S. Ct. at 2037, yet intended the words "any law," in the same statutory sentence, to have an unusually restrictive meaning.[14]

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tual right to be paid the "full" value of previously accrued but unpaid dividends. 334 U.S. at 185, 188, 201.

[13] H.R. Conf. Rep. No. 103-677, 103d Cong. 2d Sess. 83 (1994) (accompanying H.R. 2739). H.R. 2739 was passed as the Federal Aviation Administration Authorization Act of 1994. That Act adds a new paragraph to Section 41713(b), the codified version of Section 1305. *See* the statutory appendix to this reply.

[14] In *Morales*, the United States quite properly relied on the broad, ordinary meaning of "any law," and the fact that Congress used those words "without referring to any functional subcategory of those laws," as a structural reason for a broad interpretation of "relating to." Brief for the United States As Amicus Curiae Supporting Respondents (No. 90-1604), at 13; *id.* at 10. Here, the United States is urging the Court to create "functional subcategories" of common law contract claims.

There is certainly no "clearly expressed" legislative intent to restrict the ordinary meaning of "any law." Nothing in the legislative history suggests that Congress intended to preempt state enforcement of some contract claims, but not others, depending on "the extent to which" the claims rely on state policies. U.S. Br. at 30. The United States urges this distinction because the legislative history evinces no specific congressional intent to include enforcement of private contractual obligations. *Id.* at 9. That argument should be rejected, as it was in *Norfolk & Western*, 499 U.S. at 125, 128, because it inverts the governing presumption that statutory terms will be given their ordinary meaning *unless* there is clearly expressed legislative intent to the *contrary*.

Tellingly, the only authority cited to support the United States' restrictive reading of Section 1305 is a quotation taken entirely out of context from the plurality opinion in *Cipollone*: "a common law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . *imposed under state law*.'" 112 S. Ct. at 2622. *See* U.S. Br. at 21. That sentence in *Cipollone* did not purport to interpret the phrase "any law" because the statute at issue there preempted only "requirements or prohibitions imposed under state law." The *Cipollone* plurality said only that a voluntarily undertaken obligation is not a "requirement imposed under state law," and thus was not preempted under the very different statute at issue in that case.

The argument for rewriting Section 1305 to include the "requirements . . . imposed under state law" standard of the statute at issue in *Cipollone* is policy-driven, not textual, as the United States all but concedes. U.S. Br. at 17 (Section 1305 "could perhaps be read to preempt

even state-court enforcement of private contracts"). However, it is improper to rewrite clear statutory text even if the statute's overall "purpose" might arguably be better served by disregarding the statute's ordinary meaning. *Interstate Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439 (1994); *Greyhound Corp., v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). And here, preempting only "normative" contract claims would *not* better serve the ADA's purposes. To the contrary, the policy argument the United States advances here is indistinguishable from the argument that Section 1305 should be construed to preempt only affirmative state regulation or its equivalent, and that argument was emphatically rejected in *Morales*. 112 S. Ct. at 2037-38.

B. The Restrictive Reading Urged by the United States Frustrates the ADA's Objectives, Is Unworkable, and Is Unnecessary Because DOT Has Ample Authority to Enforce Preempted Contract Claims.

Lacking support in the statutory text or legislative history, the United States argues that its suggested revision of Section 1305 would be more "consistent with the ADA's deregulatory purpose." U.S. Br. at 9. The argument begins with the proposition that a deregulated market "could not operate absent a mechanism by which parties may be held accountable for their contracts." *Id.* at 23. This argument rests on the incorrect assumption that unless the government's restrictive reading is adopted, Section 1305 would broadly preempt all "garden variety" contract claims. That assumption is incorrect because Section 1305 would preempt only those contract claims whose enforcement is likely to impact competitive decision-making regarding rates, routes or services. *See* pages 7-8, *supra*. Moreover, it does not follow that preemption of *state* enforcement mechanisms would leave consumers unprotected. It is equally true that a deregulated market could not operate if airlines could engage in consumer fraud and unfair business practices with impunity. But *Morales* held, and the United States agrees,

that state enforcement of those laws is preempted when their application relates to rates, routes or services. Preemption of those state laws does not leave consumers unprotected because the federal remedy provided by Congress—though not equivalent to preempted state remedies—provides meaningful protection. The same is true here.

Although Congress did not itself prescribe detailed federal remedies for those contract claims that would interfere with competitive decision-making, it gave DOT ample authority to do so.[15] DOT can enforce Section 411 against unfair trade practices, including breach of contract.[16] DOT can even abate civil penalties under Section 411 upon payment of appropriate compensation to consumers, and has done so for many years. *See* Amer. Br. at 30 (citing decisions). Indeed, the *very conduct* respondents have challenged here was challenged under Section 411. *See id.* at 33-34. DOT entertained those challenges, but denied them on the merits. If American or other airlines were breaching promises respecting the availability of frequent flyer seats, DOT could have issued a cease and desist order preventing that conduct, thereby affording the plaintiff class in this case complete relief. DOT has done exactly that in response to complaints that a particular airline was imposing undisclosed capacity controls on discount fare availability. *See id.* at 31 (citing decisions).[17] Thus, there is no doubt that the very

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[15] Of course, the federal remedies need not be a mirror image of the displaced state remedies. The federal remedies under ERISA, for example, are much less extensive than the state laws they displaced. The federal remedies *prescribed* by ERISA are more detailed than the federal remedies prescribed by the ADA because the enforceability of benefit plans was the principal focus of ERISA, whereas enforcement of contracts between airlines and passengers was not the principal focus of the ADA.

[16] Although individuals do not have a right of action under Section 411, they can petition DOT to institute enforcement action. 14 C.F.R. § 302.201.

[17] "DOT conducts an active enforcement and consumer protection program." U.S. Br. at 3. In 1993, "DOT issued 34 cease and desist orders and assessed more than $1.8 million in civil penalties." *Id.*, n.2.

conduct challenged in this case could be adequately addressed by DOT.

More generally, DOT has broad authority to issue appropriate regulations. 49 U.S.C. App. § 1354(a). DOT can promulgate effective alternatives to traditional state law contract remedies, as it has done for overbooking—which is, after all, an alleged breach of a contractual obligation. Those regulations provide a uniform, federally prescribed remedy for such breaches. The "vast majority" of the more than 50,000 persons denied boarding in 1993 "accepted the denied-boarding compensation provided under DOT's rule." U.S. Br. at 24. This remedial scheme is plainly sufficient to ensure that airlines will not breach contracts with impunity.[18]

DOT could also use the additional authority conferred by 49 U.S.C. App. § 1371(q)(2), whose text expressly provides that the remedies for breach of contract authorized by that provision are to be "prescribed by" DOT, not by state courts, a point respondents and the United States ignore. *See* Amer. Br. at 30-31.

Thus, preempting *state* enforcement of claims like those at issue here would not mean airlines could breach contracts with impunity, and would not impede ADA's objectives. To the contrary, preemption would *promote* ADA's objectives. As the United States admits, the ADA's purposes are substantially broader than mere deregulation. "The ADA was intended to create conditions for an economically stronger and more competitive domestic airline industry." U.S. Br. at 2. Section 1305 was therefore de-

[18] The regulation also permits consumers to sue in an unspecified "court of law," 14 C.F.R. § 250.9(b), but almost no consumers do. Thus, this option is clearly not necessary to ensure that the federal remedy functions as an effective substitute for traditional state remedies. Nor is it persuasive to argue, as the United States has, that frequent flyer contract claims should not be preempted (unless they turn on state policies) because DOT "thus far has chosen not to adopt regulations governing frequent flyer programs." U.S. Br. at 4. DOT is free to do so if the need arises. *See generally Northwest Airlines, Inc. v. County of Kent*, 114 S. Ct. 855, 863-865 (1993). Such regulations could prescribe standards, as well as remedies.

signed to prevent states from "impairing the federal deregulatory scheme" *or* undermining "the ADA's goal of fostering competition," and also to "ensure uniformity of the remaining regulation of the airline industry." *See id.* at 1.

Preemption of respondents' claims directly advances these policy objectives. Respondents assert "a contractual right to receive . . . the benefits to which said mileage credits were entitled under the Program in effect *when the mileage credits were earned*." Pet. App. 51a-52a (emphasis added). Under the logic of that claim, American could not change any route, schedule or equipment that was available to respondents before the change. If in 1983 respondents had accumulated enough mileage credits to purchase any of the 200 seats then available on American's flight from X to Y, American could not in May of 1988 substitute a 100 seat plane, or reduce the number of flights, because that would arguably "devalue" respondents' previously accumulated mileage credits by making fewer seats available. But enforcing such a claim would directly frustrate a specific congressional policy, because Congress clearly wanted airlines to be free to change schedules and equipment in response to changing business conditions.[19] More broadly, if "any law" excluded enforcement of private contractual obligations, plaintiffs could obtain injunctive relief (specific performance) prohibiting such schedule or equipment changes. Even respondents acknowledge that such relief would be inconsistent with ADA's objectives and would be preempted. Resp. Br. at 33; *see* Resp. Brief in Opposition in No. 92-249, at 9.

Given the inherently interstate nature of air transportation services, uniformity is itself an important goal. Allowing states to exercise "their common law powers . . . is fundamentally at odds with the goal of uniformity."

[19] Congress expressly provided that not even the DOT can "restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities . . . as the development of the business and the demands of the public shall require." 49 U.S.C. App. § 1371(e)(4).

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990). That is particularly true under the ADA, because in developing a body of uniform federal law, DOT is—but states are not—under a "statutory mandate," U.S. Br. at 2, to ensure that the law advances ADA's other policy objective of placing "maximum reliance on competitive market forces and on actual and potential competition," rather than on governmental intervention. 49 U.S.C. App. §§ 1302(a)(4) and (a)(9).[20] It thus makes perfect sense for Congress to have preempted *state* mechanisms, vesting responsibility for achieving those policy objectives at the federal level.[21]

Furthermore, common law contract claims cannot neatly or easily be categorized as purely normative or non-normative. Such formalistic distinctions rarely exist in the real world.[22] The government's test would thus impose on judges the wholly unmanageable task (particularly at the pleading stage) of determining the "extent to which" contract claims "turn on" such state policies, versus the extent to which they turn on private obligations—as is demonstrated by the United States' inability to determine how respondents' claims should be characterized.

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[20] *See* U.S. Br. at 15 ("the purpose of the ADA is to leave largely to the airlines themselves, not to federal and state agencies and courts, the power to decide what marketing mechanisms are appropriate").

[21] DOT would also have to consider, but state courts would not, the effect claims such as those at issue here would have on the airline industry, which is facing an "unprecedented economic crisis." *See* ATA Amicus Br. at 6, 16.

[22] *See generally* Morris Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 562 (1933) ("When . . . and how [to enforce a contract] are important questions of public policy . . . the notion that in enforcing contracts the state is only giving effect to the will of the parties rests upon an utterly untenable theory as to what the enforcement of contracts involves"). Many positive enactments, like the Consumer Fraud Act, are codifications of traditional common law contract principles. *See* 2 E. Allen Farnsworth, *Farnsworth on Contracts* § 5.5, at 53-59 (1990). Conversely, the common law of contract itself incorporates a host of state normative policies drawn from statutory sources. *Id.*

Nor does a distinction between normative and non-normative contract claims make functional sense. Both would have the same "connection with or reference to" American's rates and services and would seek the same relief, which would have the same direct effect on those rates and services. Recognizing this problem, the United States acknowledges that Section 1305 may preempt even non-normative claims if (as here) the "relief would . . . directly affect rates and services." U.S. Br. at 29.

III. STATE ENFORCEMENT OF RESPONDENTS' CONTRACT CLAIMS IS PREEMPTED EVEN UNDER THE UNITED STATES' TEST.

The United States agrees that contract claims are preempted "if state laws, standards, or policies are invoked . . . to invalidate or limit contract terms . . . or to impose a 'construction' on those terms that departs from the parties' agreement." U.S. Br. at 17. The United States' inability to determine whether respondents' claims are preempted under its own test stems from its failure to recognize the significance of two facts: American *expressly reserved* the right to change the terms of the AAdvantage contract at any time, and AAdvantage contracts are *unilateral* contracts.

First, the state court could not even reach the merits of respondents' claim, much less grant relief, unless it first "invalidate[s] or limit[s]" the express reservation clause contained in the contracts at issue. U.S. Br. at 17. Respondents admit that, as part of the contract, American "reserved the right to restrict, suspend, or otherwise alter aspects of the Program." Pet. App. 64a. Although respondents now argue that American only reserved the right to make "prospective" changes, Resp. Br. at 10, the reservation clause does not by its terms limit the right to make changes to "prospective" changes. It plainly states that "AAdvantage program rules, regulations, travel awards and special offers are subject to change without notice," and provides that American "reserves the right to terminate the AAdvantage program at any time." *See*

U.S. Br. at 6 n.4. Thus, for respondents to have any chance to prevail, that clause must be invalidated or limited by operation of Illinois law. "In Illinois [the] 'covenant of fair dealing and good faith . . . implied into every contract' . . . 'imposes a limitation on the exercise of discretion vested in one of the parties to a contract.'" *Bonfield v. AAMCO Transmissions, Inc.*, 708 F. Supp. 867, 884 (N.D. Ill. 1989) (citations omitted). This means that "even if [as here] the express terms of the Agreement permitted [one party, in its "discretion"] to alter its policies, it could not change them arbitrarily," and would have to act "reasonably." *Id.* at 884-885.

American has compelling arguments why its May 1988 announcement was entirely fair and reasonable. The point, however, is that American's express reservation clause will bar respondents' contract claims unless that announcement is found under state normative doctrines to be unfair or unreasonable.

Second, respondents do not allege that American *expressly* promised to make available any seat on any flight, and the program brochure they filed below contains no such express promise.[23] Thus, the state court will have to fashion contractual promises and obligations out of the many "unilateral" statements American allegedly made in "general mailings" and "promotional materials" in "diverse national media". Pet. App. 49a, 51a. This is a classic unilateral contract, the existence and material terms of which depend on state policies and constructions that are independent of the actual, subjective intent of the parties. *See Corbin on Contracts* § 63, at 264 & n.43 ("The law enforces many an obligation in the contract field that the parties themselves never clearly expressed or contemplated."). For policy reasons, Illinois has ruled that a unilateral offer cannot be withdrawn or changed once the offeree has rendered part performance.[24] However, part

[23] That brochure has been lodged with the Clerk.

[24] *Weather-Gard Industries, Inc. v. Fairfield Sav. & Loan Ass'n*, 248 N.E.2d 794, 798 (Ill. Dist. 1969) (citing Restatement of Contracts).

performance must begin within a "reasonable time."[25] And if, as here, no time for completing performance is specified, "the law will supply a reasonable time."[26] Thus, whether contractual obligations even exist will depend on state policies.

For these reasons, *respondents'* claims inescapably depend on state policies, and are therefore prempted even if "any law" preempts only normative claims.

[25] *Calo, Inc. v. AMF Pinspotters, Inc.*, 176 N.E.2d 1, 5 (Ill. 1st Dist. 1961).

[26] *Hanson v. Duffy*, 435 N.E.2d 1373, 1377 (Ill. 2d Dist. 1982); *Murphy v. Roppolo-Prendergast Builders, Inc.*, 453 N.E.2d 846, 848 (Ill. 1st Dist. 1983) ("reasonable time" for completing performance "will be implied").

CONCLUSION

The decision and judgment of the Illinois Supreme Court refusing to preempt respondents' damage claims should be reversed.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

I. PL 103-272, 108 Stat. 745, was signed into law on July 5, 1994, after petitioner's brief was filed. Section 1.(a) of that law describes the purpose of the law: "Certain general and permanent laws of the United States, related to transportation, are revised, codified, and enacted by subsections (c)-(e) of this section *without substantive change* as subtitles II, III, and V-X of title 49, United States Code. 'Transportation.' Those laws may be cited as '49 U.S.C. ——.'" (emphasis added).[1]

For the convenience of the Court we will reprint here the old and the current versions of the principal provisions relevant to this proceeding.

OLD: 49 U.S.C. App. § 1305 (a)(1) (Supp. I 1994), "Federal Preemption," provided:

> Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

NEW: 49 U.S.C. § 41713(b)(1), "Preemption of authority over prices, routes, and services," now provides:

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[1] S. Rep. 103-265, 103rd Cong. 2d Sess., May 19, 1994, also states that "[a]s in other codification bills enacting titles of the United States Code into positive law, this bill makes no substantive change in the law. . . . the law is intended to remain substantively unchanged." *Id.* at 5. The Senate Report explains that "[t]o restate the laws related to transportation in one comprehensive title, it is necessary to make changes in language. Some of the changes are necessary to attain uniformity within the title. Others are necessary as the result of consolidating related provisions of law and to conform to common contemporary usage. In making changes in the language, precautions have been taken against making substantive changes in the law." *Id.* at 3.

Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.[2]

OLD: 49 U.S.C. § 1506 (Supp. I 1994), "Remedies not exclusive," provided:

Nothing contained in this Chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter are in addition to such remedies.

NEW: 49 U.S.C. § 40120(c), "Relationship to other laws," now provides:

Additional Remedies.—A remedy under this part is in addition to any other remedies provided by law.

OLD: 49 U.S.C. App. § 1381(a) (Supp. I 1994), "Methods of competition; incorporation by reference," provided:

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

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[2] "Price" is defined in new 49 U.S.C. § 40102(a)(35) as "a rate, fare, or charge for air transportation."

NEW: 49 U.S.C. § 41712, "Unfair and deceptive practices and unfair methods of competition," now provides:

On the initiative of the Secretary of Transportation or the complaint of an air carrier, foreign air carrier, or ticket agent, and if the Secretary considers it is in the public interest, the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation. If the Secretary, after notice and an opportunity for a hearing, finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice or method.

OLD: 49 U.S.C. App. § 1371(q)(2) (Supp. I 1994), "Insurance and liability," provided:

In order to protect travelers and shippers by aircraft operated by certificated air carriers, the Board may require any such air carrier to file a performance bond or equivalent security arrangement, in such amount and upon such terms as the Board shall prescribe, to be conditioned upon such air carrier's making appropriate compensation to such travelers and shippers, as prescribed by the Board, for failure on the part of such carrier to perform air transportation services in accordance with agreements therefor.

NEW: Section 41112(b), "Liability insurance and financial responsibility", now provides:

Financial Responsibility.—To protect passengers and shippers using an aircraft operated by an air carrier issued a certificate under section 41102 of this title, the Secretary may require the carrier to file a performance bond or equivalent security in the amount and on terms the Secretary prescribes. The bond or security must be sufficient to ensure the carrier

adequately will pay the passengers and shippers when the transportation the carrier agrees to provide is not provided. The Secretary shall prescribe the amounts to be paid under this subsection.

II. The Federal Aviation Administration Authorization Act of 1994, H.R. 2739, was passed by both the House and Senate on August 8, 1994, after petitioner's brief was filed. *See* 140 Cong. Rec. H7116-23 (daily ed. Aug. 8, 1994); *id.* at S10951-55. As of August 18, 1994, the Act had not yet been signed by the President. Section 601(b)(1) of the Act adds a new paragraph to Section 41713(b), the codified version of Section 1305. The new paragraph provides as follows:

49 U.S.C. § 41713(b)(4):

"(4) TRANSPORTATION BY AIR CARRIER OR CARRIER AFFILIATED WITH A DIRECT AIR CARRIER.—

"(A) GENERAL RULE.—Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

"B) MATTERS NOT COVERED.—Subparagraph (A)—

"(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to mini-

mum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

"(ii) does not apply to the transportation of household goods, as defined in section 10102 of this title.

"(C) APPLICABILITY OF PARAGRAPH (1).—This paragraph shall not limit the applicability of paragraph (1).".